Nos. 135 and 198.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner*

v.

ALFRED W. JONES, Receiver for Georgia and Florida Railroad.

ALFRED W. JONES, Receiver for Georgia and Florida Railroad, *Petitioner.*

v.

THE UNITED STATES

PETITION FOR RE-HEARING.

MOULTRIE HITT,
Attorney for
Alfred W. Jones, receiver,
Georgia and Florida Railroad,
601 Tower Building,
Washington 5, D. C.

FILED: May 3, 1949

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 135

THE UNITED STATES, *Petitioner*

v.

ALFRED W. JONES, Receiver for Georgia and Florida Railroad.

No. 198

ALFRED W. JONES, Receiver for Georgia and Florida Railroad, *Petitioner.*

v.

THE UNITED STATES

PETITION FOR RE-HEARING.

To the Supreme Court of the United States:

Your petitioner, Alfred W. Jones, Receiver for Georgia and Florida Railroad, respectively requests a rehearing of the order of this Court April 18, 1949 reversing the judgment of the United States Court of Claims and remanding the cause with instructions to dismiss.

Summary Statement of Facts.

This suit in the Court of Claims is for the recovery in quantum meruit upon a quasi contract necessarily implied from the constitutional duty laid upon the Federal Government to pay just quantum meruit compensation for a law-

ful taking of property under the provisions of a statute, viz., the Railway Mail Pay Act of 1916.

Prior to the filing of the suit all administrative remedies were exhausted, viz., by an unsuccessful effort to get the Interstate Commerce Commission to fix a schedule of prices for the unit items taken which would yield enough to meet the duty of the Government to pay just compensation on a quantum meruit basis.

In the proceedings before the Commission the carrier on the one side and the Post office Department on the other were the only parties to the proceeding. The Post Office Department frankly admitted that the schedule of pay which was currently being applied to this carrier was insufficient to yield this carrier just compensation (Trans. in 63 (1937) p. 142); and participated in a joint study for the purpose of developing the facts as to the cost to this carrier alone. That study was upon the same basis usually and customarily followed in all such ascertainments. Its chief witness, who conducted the field test for the Post Office Department tesfified that it was the most equitable he could devise (Trans. in No. 63 (1937) pp. 169, 170). The Commission found that said joint cost study indicated that 87.4% more than the unit price schedules being currently applied would be necessary to meet the cost and pay the carrier a reasonable return.

Despite that evidence the Post Office Department urged the Commission to disregard the evidence on the cost of the service, and, instead of fixing new unit price schedules which the evidence justified, to impose other and plainly inadequate unit price schedules which the Commission had promulgated on a different record in another case; and the Commission followed just that course. To support its action the Commission gave various reasons, all of which so wholly lacked merit, that any presumption of correctness or weight was rebutted.

The carrier first sought relief from the Commission's arbitrary action by a suit for injunction in a three-judge

Federal Court, and on the showing that the Commission had acted arbitrarily and unreasonably, and its orders were confiscatory, that Court twice issued decrees directing the Commission to take other and different action which would meet the constitutional duty to pay the claimant just compensation. On appeal, however, this Court held in the *Griffin* case that the three judge court did not have jurisdiction, and, in effect, referred the carrier to the Court of Claims for remedy under the latter's jurisdiction over claims either under (a) an Act of Congress, or (b) as a matter of constitutional right to just compensation.

Following this Court's said decision in the *Griffin* case, the present suit was filed in the Court of Claims on both of the aforesaid grounds of jurisdiction, but more particularly upon the ground of confiscation.*

Ample proof that the Commission's order was arbitrary, unreasonable and confiscatory was made in the lower court in the form of a copy of the transcript of the record before this Court in the *Griffin* case, No. 63, October Term, 1937. That proof included all the detailed evidence in the 1931 proceeding before the Commission, together with the Commission's findings and orders with relation thereto.** The Court made comprehensive special findings of fact appropriate to the evidence to which no exceptions were taken, but, unfortunately, in passing upon the allowance of interest, it said it was giving effect to an order of the Commission as properly construed, and was not determining compensation in an original proceeding under the Fifth Amendment. This carrier petitioned this Court for writ of certiorari to review the decision on specifications of errors upon these points.

This Court handed down its decision in which (1) first it reasoned that if the proceeding was one for the review of

---

* Before the case came to trial in the Court of Claims, the proceedings were suspended on motion of the carrier, to petition the Commission for a rehearing and reconsideration. That petition was so filed but was summarily denied.

** Incidentally all of that evidence is within the judicial notice of the Court.

an order of the Commission in a rate case the lower Court had not followed the correct principles in that kind of a proceeding; and (2) then concluded that the Court of Claims did not have the power to substitute its judgment for that of the Commission on review of a rate order; and on that footing reversed the judgment and remanded the cause to the Court of Claims with instructions to dismiss it.*

* The opinion does not indicate that the Court gave any consideration to the effect of the plaintiff's own exceptions in Case No. 198 to the error of the Court of Claims in resting its decision upon the wrong grounds; and seems to have been lead by the defendant's representations into several misapprehensions, including the following:

(1) (Page 4, par. 3). That the suit involved a reconsideration of the Commission's order of July 10, 1928 (144 I. C. C. 675); whereas it was expressly confined to the period on and after April 1, 1931.

(2) (Page 10, par. 1). That the suit was one for review of a legislative rate order; whereas it was a suit in quantum meruit on quasi contract.

(3) (Page 12, par. 3). That the general classification of carriers and general rates applicable to all carriers by the Commission under 39 U. S. C. 549 had been in issue before the Commission; whereas the 1931 proceeding before the Commission was only under 39 U. S. C. 553, and the question of general classification of carriers and rates based on classification under 39 U. S. C. 549 were not in issue in the Court below.

(4) (pp. 13, 14, 15, 16). That the crux of the present case was the question of how to treat unused space in passenger train cars; whereas the record, in evidence here, of the proceedings before the Commission showed that such contentions of the defendant were without merit.

(5) (Page 16, par. 2, 3). That the rates applied to this carrier 1928-1931 were in issue; whereas the suit at bar was restricted wholly to a period on and after April 1, 1931.

(6) (Page 17, par. 20, 23). That the "factors", "circumstances", or "reasons" given by the Commission to justify its disregard of its finding upon the joint cost study, were entitled to presumptive weight; whereas the record showed they were invalid and worthless.

(7) (Page 23, par. 1). That the lower Court improperly disregarded the effect of that part of the statute (39 U. S. C. 549) which authorized the Commission to classify carriers and make general rates for them; whereas the action of the Commission under 39 U. S. C. 549 was not in issue, and this carrier was under no duty to attack the same.

(8) (Page 23, par. 2; Page 24, par. 2; Page 28, par. 2). That this Court "cannot say" that the Commission acted arbitrarily, and "the carrier has not sustained its burden of showing that the Commission acted arbitrarily or unreasonably"; whereas it is ascertainable from the detailed record of the proceedings before the Commission that the Commission did act arbitrarily and unreasonably, that its order was confiscatory, and that the plaintiff did sustain the burden upon it that detailed record was before the lower Court, and is presently before this Court, either in the transcript in this case, or in the transcript in case No. 63 (1937) of which this latter Court can take judicial notice.

Question Presented.

Was, and is, the third remedy cited, as suggested in the Griffin case, viz. a suit in a Federal District Court, barred by the Tucker Act, since the gist of the action is for the enforcement of a right in quasi contract necessarily implied from the Fifth Amendment.

This question is substantial because an answer in the affirmative would fairly require that the case be remanded for correction instead of being ordered dismissed.

The precise question herein presented was not previously presented because it was never conceived that the suit brought and proven as a claim in quasi contract within the jurisdiction of the lower Court, would be disposed of *as though* it had been brought for a review of an order of the Commission, or *as though* the plaintiff had not duly excepted to the error of the Court below in failing to put the decision upon the ground that it was determining compensation in an original proceeding under the Fifth Amendment.

Grounds of Petition for Rehearing.

The rule that equity will not take jurisdiction where there is an adequate remedy at law, would seem to bar suit in a Federal District Court for the exercise of equity jurisdiction because the Government has provided another adequate remedy in the Tucker Act, viz. it may be sued in the Court of Claims in an action the gist of which is a claim in quantum meruit against the Government.*

The above grounds are substantial because: (a) a conclusion on the question in the affirmative would fairly re-

*This ground is not the same as those reasons given in oral argument in reply to questions from the bench as to why the plaintiff had not resorted to the third remedy suggested in the Griffin case. These reasons were: (1) the same opinion had pointed out two possible remedies in the Court of Claims, (2) that the sum involved was greater than could be sued upon in a District Court, and (3) that the same opinion had reaffirmed the so-called "Negative Order Doctrine", as a bar to the review of Commission action.

quire reconsideration of the opinion and decision in other respects; while, on the other hand (b) a conclusion in the negative would seem to yet give the plaintiff a remedy, since there is no statute of limitation to prevent the Commission from reopening the proceedings before it and reconsidering its action, if so required by a District Court in the exercise of equity powers.

In any event there is no question but that the plaintiff brought its action in the lower Court as being on a claim in quantum meruit, and not as a proceeding to review the Commission's action. Perhaps some confusion has arisen due to the form of the evidence with which the plaintiff proved that it was entitled to the sum claimed, and that it had exhausted its administrative remedy because of the arbitrary, unreasonable and confiscatory order of the Commission. It happened simply that ample proof on these points was compactly available in the transcript of the record before this Court in the *Griffin* case, No. 63, October Term, 1937, which included all the detailed evidence in the 1931 proceeding before the Commission, together with the Commission's findings and orders with relation thereto. Therefore, it was only natural that the Court of Claims should analyze and refer so freely in its opinion to the Commission's positions on the evidentiary facts in the process of coming to its own independent con-

---

Incidentally they misled the Court by the argument that, in determining the amount which the Federal Government should pay a railroad for carrying the mails, the Interstate Commerce Commission was fixing a rate just as it fixes a rate for carrying a passenger or a piece of freight. That would account for the fact that the opinion construes the language of the lower Court as meaning that it intended to act as a Court for the review of an order of an administrative body. However, in the view of the plaintiff the lower Court did not so intend and although its phraseology was unfortunate, the plaintiff respectfully submits that it should be read in the light of the fact that the lower Court was evidently trying to conform its wording to the wording used by this Court in the *Griffin* case in holding that there were two grounds of jurisdiction, viz., (1) statutory, (2) constitutional.

The plaintiff-respondent brought its action upon both grounds, and it was to explain the denial of interest that the Court of Claims declared that it was putting its decision upon only the first and not upon the second ground of jurisdiction. *In doing that the lower Court erred, and the plaintiff properly excepted thereto, hence it is respectfully submitted that the case should be remanded for correction instead of being dismissed, especially since it concerns an absolute constitutional right.*

clusion on a money judgment. *That survey of the evidence in a suit upon judicial issue of constitutional just compensation for a money judgment is wholly different from a review of a Commission's order on a legislative issue.*

In *U. S. v. New York Central R. Co.*, 279 U. S. 73, this Court made it clear that, instead of this kind of a case being one for the review of the action of an administrative body in the ordinary determination of a "fair and reasonable rate", that, to the contrary, railway mail service is made compulsory, and the amounts which the Federal Government is required to pay for such service constitutes compensation for a compulsory taking. Therefore, it follows that the fixing of such compensation is not the fixing of an ordinary rate but is a determination of a schedule of unit prices which will produce what is the just and reasonable compensation as required by the Constitution. The fact that it is the latter is not altered merely because (1) the Congress selected the Interstate Commerce Commission as the initial medium for determining the basis for and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation;* or that (2) the term employed to designate such prices was the word "rates"; and or (3) that those from whom the use of property are taken are common carriers.

In the "landmark" case of *Monongahela Nav. Co.*, 148 U. S. 312, 327, this Court said:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislative may determine

---

* *Just Compensation Defined.*

"The word 'just' is used to intensify the meaning of the word 'compensation'. Its purpose is 'to convey the idea that the equivalent to be rendered for property taken shall be *real, substantial, full, and ample; and no legislature can diminish by one jot the rotund expressions of the constitution.*'" *Virginia, etc., R. Co.* v. *Henry*, 8 Nev. 165, 172.

what private property is needed for public purposes—that is a question of a political and legislative character, but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry".

Conclusion.

WHEREFORE the petitioner respectfully prays this Court to grant rehearing herein.

Respectfully submitted,

MOULTRIE HITT,
Attorney for
Alfred W. Jones, Receiver for
Georgia and Florida Railroad,
601 Tower Building,
Washington 5, D. C.

FILED: May 3, 1949.

Certificate of Counsel.

I hereby certify that the petition for rehearing in the above entitled matter is presented in good faith and not for delay and that it is restricted to intervening circumstances of substantial effect (*Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50) and to substantial grounds which petitioner did not previously present.

MOULTRIE HITT.

MAY 3, 1949.